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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CHARLES H. and  
LINDA F. BRANDES.

CHARLES H. BRANDES,

Appellant,

v.

LINDA F. BRANDES,

Respondent.

D072716

(Super. Ct. No. D485527)

APPEAL from a postjudgment order of the Superior Court of San Diego County,  
Steven R. Denton, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Marjorie G. Fuller, Marjorie G. Fuller; Wasser, Cooperman &  
Mandles, Bruce E. Cooperman and Amy L. Rice for Appellant.

Dick & Wagner, Stephen James Wagner; Jones Barnes, Julie R. Barnes; Law  
Offices of Gregory R. Ellis and Gregory R. Ellis for Respondent.

# I

## INTRODUCTION

Husband appeals from a postjudgment order denying his request to equitably offset amounts Husband must pay Wife for Wife's community property interest in profits from Husband's business by amounts Husband previously paid Wife as spousal support. Husband contends the court erred by failing to enforce a stipulation for a dollar-for-dollar offset or, alternatively, by failing to apply the doctrine of judicial estoppel to require a dollar-for-dollar offset.

We affirm the order as we conclude Husband has not established the existence of a binding stipulation. In addition, we conclude Husband has not established all the elements of judicial estoppel were met and, even if they were met, Husband has not established the court abused its discretion in declining to apply the doctrine under the circumstances presented.

## II

### BACKGROUND<sup>1</sup>

#### A

Throughout these dissolution proceedings, Husband and Wife have disputed whether and how much spousal support Husband must pay Wife as well as whether and how much of the profits from Husband's business were community property. The court initially awarded Wife temporary monthly spousal support of \$439,355, which the court later modified to \$200,000.

At the hearing preceding each of these awards, the parties recognized the issue of spousal support was connected to the issue of whether any of the profits from Husband's business were community property. At the hearing preceding the initial award, the following exchange between Husband's counsel and Wife's counsel occurred:

"[HUSBAND'S COUNSEL]: ... I thought [Wife's counsel] indicated previously in light of my opening argument that he's going to claim that income [Husband] is generating now is partially community property.

"[WIFE'S COUNSEL]: No. I'm not saying—what I'm saying is the court's reserving jurisdiction.

"[HUSBAND COUNSEL]: Well if the court makes an order that—let's use a hypothetical: [Husband] has \$20 million in income coming in in 2005, and you claim that \$10 million of it is reasonable compensation, but the other \$10 million is attributable for some reason to community property entitling [Wife] to \$5 million of that income, my understanding is what you were saying is that if the support order—if she gets \$5 million worth

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<sup>1</sup> This case has an extensive history. We confine our summary to the facts necessary to resolve the issues raised on appeal.

of income out of future income, then she clearly doesn't need any support. So that's what I thought the quote without prejudice was—that you were referring to.

"So [if] it's ultimately determined that any of this income that you want a piece of by virtue of guideline or other method of reaching a support figure turns out to be community that we would have an offset.

"[WIFE'S COUNSEL]: The offset could work both ways. So that's why I believe it was [the court's] suggestion we simply reserve on that issue. [The court] understands that that's a claim that can be made, and we're both reserving our respective rights.

"[HUSBAND'S COUNSEL]: We ought to have an understanding not today, but perhaps at the [next] hearing, how we're going to handle that issue. That will give us all an opportunity to brief that particular issue."

At the hearing preceding the modified award, the following exchange between Husband's counsel and Wife's accounting expert occurred:

"[HUSBAND'S COUNSEL]: Do you believe that [Husband's]—do you concede ... that all of [Husband's] income at the present time is his separate property?

"[WIFE'S EXPERT]: Absolutely, unequivocally not. I think it is substantially community property. [¶] Not an issue for today, but—

"[HUSBAND'S COUNSEL]: Okay.

"[WIFE'S EXPERT]: —I am happy to accommodate you.

"[HUSBAND'S COUNSEL]: So if any are—if the \$100 million in income is substantially community property, down the line, if you are right, [Wife] gets 50 million?

"[WIFE'S EXPERT]: Yes. And by the way, there's no question that it would be a double dip with spousal support. So I don't think there's any question that whatever [the court] orders as

spousal support, if the current income is found to be community property, there's clearly an offset for the spousal support. I am not sure it's 100 percent, but we can figure out the numbers. In concept, no argument whatsoever. If the income is community, and she gets, let's just say, half of it, then the whole spousal support situation is different. But that's really an issue for another day.

"[HUSBAND'S COUNSEL]: But we won't know what the result is until the other day occurs; is that right?

"[WIFE'S EXPERT]: Sure. But [Husband's expert] and I will be able to work backwards and make a deduction for every dollar of spousal support that [the court] might award in this interim period.

"[HUSBAND'S COUNSEL]: So if we don't make any award now, we won't have to go through that accounting problem; is that correct? You will just make your pitch for whatever percentage of his current income you claim is community?

"[WIFE'S EXPERT]: Yes .... But I don't think that two years from now or one year from now we are going to go back and talk about getting spousal support two years back either. So the spousal support issue is now.

"[HUSBAND'S COUNSEL]: If a substantial part of his income is community, you don't need spousal support; is that correct?

"[WIFE'S EXPERT]: All things being equal, I would agree with that. [¶] And I clearly agree with the double-dip argument on the community income and the spousal support. But, we don't know if it's community income, and your side is arguing that it's separate.

"[HUSBAND'S COUNSEL]: Right."

The court did not determine at either hearing whether or how much of the profits from Husband's business were community property and instead reserved jurisdiction over the issue and its effect on spousal support. As the court explained in its order:

"At the hearing [on the initial temporary spousal support award and the hearing on the modified temporary spousal support award], the issue was raised re the character of Husband's post separation earnings. At each hearing, it was agreed that the court should utilize the Husband's alleged post separation earnings as monies available for the payment of temporary spousal support. Furthermore, should it be subsequently determined that some of the aforementioned post separation earnings were community in character, this order would be subject to review and modification ... i.e., without prejudice."

## B

Wife appealed the modified temporary spousal support award on the ground the court did not consider the marital history of saving and investing in determining the amount of the award. We agreed the court erred in this respect and remanded the matter for further proceedings. (*In re Marriage of Brandes* (Sept. 25, 2007, D048375) [nonpub. opn.] (*Brandes I*).)<sup>2</sup>

In her reply papers for the remand hearing, in response to Husband's concern that awarding Wife any support would result in a double dip if Wife ultimately prevailed on her claim the community had an interest in Husband's business, Wife asserted:

"[Wife's] position has been and continues to be that when the court makes it[s] ultimate award on the property division i.e. awards [Wife] a percentage of [Husband's business] and the associated profits since separation, that any support ordered and paid previously could be offset against [Husband's] community property and profit obligations." (Fn. omitted.)

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<sup>2</sup> There have been three prior appeals in this case decided by opinion: *Brandes I*; *In re Marriage of Brandes* (Sept. 25, 2007, D048375) [nonpub. opn.] (*Brandes II*) [regarding attorney fees]; and, as we will discuss in more detail in part I.C., *post*, *In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461 (*Brandes III*).

After providing an example purporting to show why there was little danger of a double dip, Wife reiterated, "In any event, [Wife] agrees, any support award, whatever its size, could be offset against ... the ultimate accrued profit award." Then, in the brief's conclusion, Wife again asserted, "[Wife's] continued agreement to offset any temporary support award against her eventual ... accrued profit claim moots [Husband's] double dip argument."

The court ultimately entered a new order retroactively increasing the monthly temporary spousal support award to \$500,000. Neither party appealed the award and there is no indication in the record the court reserved jurisdiction to modify the award in the event of a later determination Wife had a community property interest in Husband's business or its profits.<sup>3</sup>

## C

About a year after the parties separated, the court entered a judgment of dissolution as to marital status. The court later conducted two trials on unresolved financial issues. (*Brandes III, supra*, 239 Cal.App.4th at p. 1468.) The first trial focused on the characterization of Husband's business as separate and/or community property. (*Ibid.*) At the conclusion of the trial, the court determined Husband's business was Husband's separate property. (*Id.* at p. 1469.)

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<sup>3</sup> There is some indication in the record that, for purposes of the remand hearing, Husband admitted and assumed the community had at least a 10 percent interest in Husband's business.

The second trial focused on the remaining financial issues, including Wife's request for spousal support and whether the community had any interest in 10,000 shares of stock in Husband's business, which Husband purchased from another shareholder during the marriage. (*Brandes III*, *supra*, 239 Cal.App.4th at p. 1470.) At the conclusion of the hearing, the court awarded Wife monthly spousal support of \$450,000. The court also determined the community had no interest in the 10,000 shares. (*Id.* at pp. 1470-1471.)

Both parties appealed the resulting judgment. (*Brandes III*, *supra*, 239 Cal.App.4th at pp. 1466–1467.) Wife's appeal included a challenge to the court's determination the community had no interest in the 10,000 shares. (*Id.* at p. 1481.) Husband's appeal challenged the spousal support award. (*Id.* at pp. 1467, 1489.)

We concluded the community had an interest in an undetermined portion of 6,000 of the shares. (*Brandes III*, *supra*, 239 Cal.App.4th at pp. 1467, 1484–1487.) This conclusion affected one of the factors for determining spousal support, which required the court to revisit the spousal support issue. (See Fam. Code, § 4320, subd. (e) ["the obligations and assets, including the separate property, of each party"].) Consequently, we declined to decide Husband's appeal of the spousal support award. (*Brandes III*, at pp. 1467, 1490.) Instead, we remanded the matter to the trial court for further proceedings, specifically directing the trial court "to (1) ascertain the percentage of [the 6,000] shares that are [Husband's] separate property because he purchased them with his separate property down payment, and the percentage of shares that are community property because they were purchased under the promissory note; (2) value the



community's interest in the percentage of shares belonging to the community; (3) consider whether the community is entitled to a commensurate share of any ... profit distributions [from Husband's business] made to [Husband] after the community acquired an ownership interest in a portion of the 6,000 shares; (4) divide the community's interest in the shares and distributions between [Wife] and [Husband]; and (5) reconsider the spousal support award in light of any changes to [Wife's] separate estate."<sup>4</sup> (*Id.* at p. 1490.)

## D

On remand, the parties agreed to bifurcate and delay the trial on the spousal support issue pending the outcome of the trial on the business issues. Before the trial on the business issues, the parties agreed: (1) the community owned 4,800 shares in Husband's business; (2) the community's shares represented 4.7525 percent of the business; (3) the community had no equity in the shares because the cost of their acquisition, which Husband paid from his separate property, exceeded their value; (4) the past net profit distributions attributable to the community's shares was \$29,397,375 and Wife's half of the net distributions was \$14,698,687. The parties then asked the court to

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<sup>4</sup> While *Brandes III* was pending, Husband sought a modification of the spousal support award based on changed circumstances, some of which mirror arguments Husband raised in *Brandes III*. The court agreed there were changed circumstances and reduced Wife's monthly spousal support to \$235,000. Neither party appealed this award.

address whether Husband was entitled to any equitable offsets or credits from Wife's share of the distributions for the spousal support Husband previously paid Wife.<sup>5</sup>

After considering the parties' evidence and arguments, the court denied Husband's request for an equitable offset. The court found the equitable considerations, including the length of the dispute over whether Wife had any community property interest in Husband's business and its profits and the purposes of temporary spousal support, did not favor providing Husband the equitable offset he sought. The court further found, since the community property profit distributions increased Wife's separate estate, the fairer and more equitable remedy is for Husband to seek a reduction in future spousal support payments.<sup>6</sup>

### III

#### DISCUSSION

##### A

Husband first contends the court erred by failing to enforce the parties' stipulation to offset Wife's community interest in the profits from Husband's business by the amount

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<sup>5</sup> The parties also asked the court to determine whether Wife was entitled to any interest or rate of return on any distributions owed her. The parties have not challenged the court's determination of this issue in this appeal.

<sup>6</sup> The trial court certified there was probable cause for immediate appellate review of its decision on Husband's equitable offset claim, and we granted Husband's motion for an interlocutory appeal of the decision. (Fam. Code, § 2025; Cal. Rules of Court, rule 5.392.) Nothing in the record indicates the bifurcated trial on the spousal support reconsideration portion of our remand order has occurred. Consequently, any issues related to the spousal support reconsideration portion of our remand order are not properly before us and we decline Husband's invitation in his reply brief to address them in this appeal.

of spousal support Husband paid. However, the court found there was no such enforceable stipulation between the parties and the record supports the court's finding. (*In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1458 [appellate courts review a trial court's factual findings for substantial evidence, resolve conflicts in the evidence in favor of the prevailing party, and draw all reasonable inferences to uphold the trial court's decision].)

"A stipulation is an agreement between counsel respecting business before the court ...." (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142.) "When a proposed stipulation is accepted by the other side, such stipulation becomes binding upon the court so long as it is not illegal or contrary to public policy. [Citations.]" (*Leonard v. City of Los Angeles* (1973) 31 Cal.App.3d 473, 477 (*Leonard*).)

A stipulation made orally in open court requires no particular form; however, the court must note the stipulation in its minutes and the stipulation's terms must be sufficiently definite and certain to provide a proper basis for a judicial decision.<sup>7</sup> (*Harris v. Spinali Auto Sales, Inc.* (1966) 240 Cal.App.2d 447, 452.) In addition, the stipulation may not bind a court on questions of law, including legal conclusions to be drawn from admitted or stipulated facts. (*Leonard, supra*, 31 Cal.App.3d at p. 476.)

Here, there is no evidence of a definite and certain statement of terms proffered and assented to by the parties in open court sufficient to find Wife agreed Husband could

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<sup>7</sup> Some of the proceedings in this case occurred before privately compensated temporary judges. Although temporary judges may not keep minutes of the proceedings before them, any stipulations between the parties should nonetheless be reflected in the record (i.e., orders, statements of decision, exhibits, and/or reporter's transcripts).

offset any spousal support he paid her dollar-for-dollar against any community property interest she might have in the profits of his business. There is also no evidence of an entry of such a definite and certain statement of terms in the record. At most, the record shows an understanding by the parties' counsel and Wife's expert that Husband could claim and possibly receive some sort of offset remedy if, as Wife asserted, she had a substantial community property interest in Husband's business and its profits. However, the details of this understanding are not sufficiently definite and certain to constitute a stipulation and, even if they were, Husband's entitlement to an offset remedy is a nonbinding legal conclusion.

The court undoubtedly understood this limitation. Rather than refer to the existence of a stipulation or adopt the notion Husband would be entitled to any particular offset remedy, the court simply reserved jurisdiction to review and modify the temporary spousal support order should Wife be found to have a community property interest in Husband's business or its profits.<sup>8</sup> Absent the existence of a binding stipulation, Husband has not established the court erred by failing to enforce the stipulation.

## B

Husband alternatively contends the court erred by failing to apply the doctrine of judicial estoppel to offset the amount of Wife's community interest in the profits of Husband's business by the amount of spousal support Husband paid. (See, e.g., *Henn v. Henn* (1980) 26 Cal.3d 323, 332 [husband may seek to limit retrospective enforcement of

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<sup>8</sup> The record does not show there was a similar reservation of jurisdiction in connection with the permanent spousal support award.

wife's claim to her community share of husband's pension that was omitted from the judgment dividing their community property by demonstrating wife received additional spousal support payments in lieu of her community share in the pension].)

"We review the findings of fact upon which the application of judicial estoppel is based under the substantial evidence test. [Citation.] When the facts are undisputed, we independently review whether the elements of judicial estoppel have been satisfied. [Citation.] Whether the doctrine should be applied even if the necessary elements are satisfied is a matter within the discretion of the trial court, which we review under the abuse of discretion standard. [Citation.]" (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121 (*Owens*).) "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.]" (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

The doctrine of judicial estoppel "prohibits a party from asserting a position in a legal proceeding that is contrary to a position he or she successfully asserted in the same or some earlier proceeding. [Citation.]" (*Owens, supra*, 220 Cal.App.4th at p. 121; see Evid. Code, § 623.) "The elements of judicial estoppel are '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]" (*Owens*, at p. 121.)

Husband has not established all the elements of judicial estoppel were met in this case. First, for the doctrine of judicial estoppel to apply, Wife's purported inconsistent positions had to have been factual in nature. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1245.) Whether Husband is entitled to offset Wife's share of the community property profit distributions from his business against past spousal support payments is a legal issue, not a factual issue.

In addition, the record does not show the court, when determining spousal support, adopted or accepted as true the proposition Husband would be entitled to an offset. Instead, the record indicates the court based its determination of permanent spousal support on the factors in Family Code section 4320 and its determination of temporary spousal support on Wife's need, Husband's ability to pay, and the parties' accustomed marital lifestyle, with the objective of maintaining the status quo pending the division of their assets and obligations. (See Fam. Code, § 3600; *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) Although the court acknowledged the existence of the offset issue in one of its orders awarding temporary spousal support, the court did not express an opinion on the issue's merit. Rather, the court made the order "without prejudice," reserving jurisdiction to review and modify the order "should it be subsequently determined that some of the aforementioned post separation earnings were community in character."

Finally, "[e]ven if the necessary elements of judicial estoppel are satisfied, the trial court still has discretion to not apply the doctrine. [Citation.]" (*Owens, supra*, 220

Cal.App.4th at p. 121.) The court opted not to apply the doctrine in this case because the court found the equitable considerations did not favor the doctrine's application. As the court explained,

"The entitlement to ... stock ownership [in Husband's business] and the distribution income was at all times contested. [Wife] was knowingly deprived of those funds throughout the proceedings until the appellate court's reversal of the underlying trial court orders and judgment. The spousal support orders were necessitated to maintain [Wife] at or near the marital standard of living in part because she was deprived of access to what turned out to be her share of the ... distribution funds [from Husband's business].

"[Husband] now seeks a 'dollar for dollar' equitable offset on the basis of what the court might have ordered had [Wife] been receiving those funds over the years. *The [c]ourt does not conclude that where one spouse disputes and prevents receipt of funds which are later determined were due a supported spouse that equity demands a credit for the support paid.*" (Italics added.)

The court further found, since the community property profit distributions will increase Wife's separate estate, the fairer and more equitable remedy is for Husband to seek a reduction in the amount of permanent spousal support payable in the future. On this record, we cannot conclude the court's decision exceeded the bounds of reason.

Consequently, Husband has not established the court abused its discretion in declining to apply the doctrine. Given our conclusions on this and the preceding issue, we need not address the remaining issues raised in Husband's appeal.

IV

DISPOSITION

The order is affirmed. Respondent is awarded her appeal costs.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.